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Supreme Court, U.S.
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No. 92-789

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents,

and

DON VAN VRANKEN on behalf of himself and all others similarly situated,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF FOR INTERVENOR-RESPONDENTS IN OPPOSITION

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33 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The question presented by the "Petition For A Writ of Certiorari To The Temporary Emergency Court of Appeals Of The United States," dated November 5, 1992 ("Petition"), does not accurately reflect the decision of the appellate court reprinted at Appendix A to the Petition. Neither is the issue framed by the Petition an extension or refinement of the appellate ruling. The judgment of the court of appeals did not rest on an interpretation of this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), and, therefore this case does not present or require an interpretation of that ruling. Rather, the judgment of the appellate court was grounded upon an interpretation of regulations and judicial authority unique to the now expired federal regulations that governed the maximum pricing of gasoline and certain other refined petroleum products between 1973 and 1981. Accordingly, the only question presented for review is whether the appellant court correctly concluded that the United States Department of Energy acted within its sound discretion in applying its regulations to deny a request by Petitioner to refile certain cost reports in order to reallocate costs from one regulatory category to another.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

COUNTERSTATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 5

I. THE DECISION OF THE TEMPORARY EMERGENCY COURT OF APPEALS DOES NOT TURN ON THE INAPPLICABILITY OF THE *BEAM* DECISION IN CASES INVOLVING FEDERAL AGENCY REGULATIONS 8

II. DENIAL OF ARCO'S REQUESTED REALLOCATION DOES NOT CONSTITUTE THE APPLICATION TO IT OF AN INVALID REGULATION 10

CONCLUSION 14

APPENDIX A 1a

APPENDIX B 9a

TABLE OF AUTHORITIES

CASES

Chevron U.S.A., Inc. v. Department of Energy, 944 F.2d 914 (Temp. Emer. Ct. App. 1991) 13

Harper v. Virginia Department of Transportation, 410 S.E.2d 629 (Va. 1991), *cert. granted*, 112 S. Ct. 1934 (1992) 9

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) ..... *passim*

Mobil Oil Corp. v. DOE, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 ..... *passim*

Mobil Oil Corp. v. DOE, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) 3

Mobil Oil Corp. v. DOE, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982) 3

Van Vranken v. Atlantic Richfield Co., 699 F. Supp. 1420 (N.D. Cal. 1988), *aff'd.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989), *cert. denied*, 494 U.S. 1005 (1990) 2

Van Vranken v. Atlantic Richfield Co., 890 F.2d 421 (Temp. Emer. Ct. App. 1989) 3, 7, 11, 12

STATUTES

12 U.S.C. §1904 (1988) 6, 11

15 U.S.C. §754(a)(1988) 7

REGULATIONS

Fed. R. App. P. 4 11

46 Fed. Reg. 9909 (1981) 6

10 C.F.R. § 205.50 10

United States Supreme Court Rule 17 5

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UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
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DON VAN VRANKEN on behalf of himself and all others similarly situated,
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On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR INTERVENOR-RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Contrary to Petitioner's assertion, The Temporary Emergency Court of Appeals ("TECA") did not hold that *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) is inapplicable to federal court rulings involving agency regulations, nor did it directly or indirectly require

Petitioner to adhere to a regulation that is substantively or procedurally invalid. In fact, TECA's decision was premised on the assumption that *Beam* would extend the invalidation of the agency regulation to Petitioner. It is simply that the effect of the invalidation is not as Petitioners desires it to be. As TECA states: "Moreover, even if *Beam* is applicable to this case, its application does not entitle ARCO to the desired remedy of reallocating its costs for the applicable period." (Pet. App. A at 8a.) The basis for this conclusion is the regulations and case law specific to the federal price controls.

The appellate court merely confirmed the Department of Energy's ("DOE") exercise of discretion in rejecting the efforts of the Atlantic Richfield Company ("ARCO"), a firm regulated by the now expired federal controls on petroleum prices, to reallocate crude oil costs for the purpose of justifying prices challenged in a civil overcharge action. TECA concluded that the invalidation of a regulation governing the allocation of crude oil costs did not make ARCO's proposed reallocation mandatory, and therefore that the DOE was not required to accept ARCO's revised cost figures. Examining all of the factors surrounding the proposed reallocation, the appellate court found, as had the district court, that the DOE had not abused its discretion in denying ARCO permission for the reallocation.

This Petition is the second time that ARCO has attempted to convince this Court that it should reverse a TECA decision denying ARCO the right to reallocate these costs. ARCO's previous attempt was litigated between 1988 and 1990, and is reported at *Van Vranken v. Atlantic Richfield Co.*, 699 F. Supp. 1420 (N.D. Cal. 1988), *aff'd.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989), *cert.*

denied, 494 U.S. 1005 (1990). The *Van Vranken* action is a private class action brought by Intervenor-Respondents as a result of ARCO's violation of DOE regulations controlling the maximum costs of import fees and duties and crude oil transferred between affiliated entities that could be used to support refined product prices. The violations alleged in *Van Vranken* are totally unrelated to the V factor regulation whose invalidation is the basis for the proposed reallocation.

The reallocation issue originally arose in the *Van Vranken* case in 1988 when ARCO asserted, by way of a motion for summary judgment, that it had the right to use the reallocated cost figures in presenting evidence of allegedly unrecovered *bona fide* costs available to offset any illegal costs that plaintiffs might prove. In support of that motion, ARCO argued that the invalidation of the V factor regulation by TECA in the *Mobil* cases[1] compelled or permitted ARCO to change its original cost allocations to more favorable allocations which would have been prohibited by the invalidated regulation. The district court denied ARCO's motion and certified its decision for interlocutory appeal. TECA accepted the appeal and affirmed. TECA held that the invalidation of the V factor regulation did not compel a cost reallocation since ARCO's original allocation was lawful under both the invalidated amendment and the regulation that became operative as a result. *Van Vranken v. Atlantic Richfield Co.*, *supra*, 890 F.2d 421. TECA further held that ARCO's

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[1] *Mobil Oil Corp. v. DOE*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 ("*Mobil I*"); *Mobil Oil Corp. v. DOE*, 647 F.2d 142 (Temp. Emer. Ct. App. 1981), ("*Mobil II*"); and *Mobil Oil Corp. v. DOE*, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982) ("*Mobil III*").

proposed reallocation, like all cost reallocations, was subject to the sound discretion of the DOE. Following this Court's denial of ARCO's petition for the review of that judgment in 1990, ARCO attempted to file revised cost figures with the DOE and the instant litigation ensued.

During the years that ARCO litigated the attempted reallocation with the DOE, two important events occurred in the *Van Vranken* action. In June and July 1992, the *Van Vranken* damage claims were the subject of a four week jury trial at which ARCO was found guilty of *willfully* violating the price control regulations by computing refined product prices on the basis of crude oil costs that it did not actually incur and which it *knew* it could not lawfully use to establish prices for controlled products. Judgment in the amount of $63.1 million was entered in favor of a nationwide class of direct purchaser retailers and resellers. The specific regulations which ARCO was found to have willfully violated at the *Van Vranken* trial govern the computation of allowable "increased costs of crude oil" -- specifically, the recovery of import fees and customs duties -- and are completely separate and distinct from the invalidated V factor amendment. As stated above, the *Van Vranken* plaintiffs never sought damages as a result of any action taken by ARCO with regard to the allocations at issue in the DOE action.

In addition, as a result of a ruling by the *Van Vranken* district court in February 1991, the parties did not litigate the existence of unrecovered costs as a potential offset to the illegal costs found by the jury. The district court ruled that ARCO failed to allege the affirmative defense that it had *bona fide* unrecovered costs

(including the potentially reallocated costs at issue in its action against DOE) and then subsequently denied a motion by ARCO to amend its Answer[2]. While ARCO has appealed these rulings, ARCO's assertion that a reversal of the court of appeals and order that the DOE allow the proposed reallocation would "eliminate[] entirely or substantially reduce[]" (Pet. at 5, n. 12) the overcharges proved at the *Van Vranken* trial is a bald misrepresentation. In fact, at this time, there is no practical consequence of TECA's refusal to order the DOE to accept ARCO's belated V factor reallocations, and there can be none unless and until ARCO prevails on this aspect of its appeal from the *Van Vranken* judgment.

REASONS WHY THE PETITION SHOULD BE DENIED

The general considerations governing the grant of a writ of certiorari to review a federal appellate decision are set forth in Rule 17 of the Rules of this Court. ARCO's Petition fails to present any "special and important reasons" for this Court to review a narrow TECA decision concerning the calculation of crude oil costs under a regulatory program that was dissolved twelve years ago.

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[2] This Court can take judicial notice of the District Court's rulings regarding ARCO's waiver of this affirmative defense. An excerpt of the relevant portions of the District Court's February 12, 1991 Order regarding the pleading of the affirmative defense is reproduced as Appendix A. ARCO's notice of appeal from this order and from the denial of leave to amend (Issues 2 and 3) is reproduced as Appendix B hereto.

ARCO incorrectly portrays the TECA ruling as one of general application to the future of administrative law which is in conflict with the decisions of other courts of appeals. To the contrary, the TECA holding does not turn on a finding that this Court's decision in *James B. Beam Distilling Co., v. Georgia*, 111 S. Ct. 2439 (1991) ("*Beam*") is inapplicable to decisions involving federal regulatory action, nor does it "evade" *Beam* by applying an invalid regulation to ARCO. Rather, the TECA decision concerns the *effect* of the invalidation of a federal regulation on the requirements of a particular federal program which controlled the prices of refined petroleum products between August 1973 and January 31, 1981. It is grounded not in general administrative law principles, but rather in two specific regulations unique to the price control program -- one, governing the ability of a refiner during the control period to retroactively reallocate costs from a regulatory category called "exempt products" to another category known as "covered products," and the other providing the criteria under which the DOE determines whether to permit a retroactive reallocation of costs.

The TECA ruling has no current regulatory application since petroleum price controls were lifted on January 28, 1981, by Executive Order No. 12287, 46 Fed Reg. 9909 (Jan. 30, 1981). Moreover, the decision is fact-specific and, due to the elimination of ARCO's affirmative defense in *Van Vranken*, it currently has no relevance to any party other than ARCO. Further, the decision is based on established TECA precedent denying ARCO the requested relief which this Court previously declined to review.

TECA is a specially constituted appellate court with exclusive nationwide jurisdiction over litigation arising under the Economic Stabilization Act of 1970, §211, 12 U.S.C. §1904 note and the Emergency Petroleum Allocation Act of 1973 §5, 15 U.S.C. §754(a). TECA simply cannot conflict with "another federal court of appeals" when it speaks to an issue concerning the price control regulations, since no other federal appellate court has jurisdiction to address these issues.[3] Moreover, as noted by TECA in its earlier rejection of ARCO's attempts to translate the V factor invalidation into an automatic cost reallocation, ARCO's contention that "in light of the invalidation of the 1974 amendment, it *must* retroactively reallocate its costs from exempt to covered goods" was rejected by at least five district courts before TECA reached the issue. *Van Vranken v. Atlantic Richfield Company*, 890 F.2d 421, 423 (Temp. Emer. Ct. App. 1989) (emphasis in original).[4] Now the DOE and the District Court of the District of Columbia in this case must be added to the list of courts who have rejected ARCO's position. It appears that the only disagreement present here is between ARCO and the federal judiciary.

ARCO's Petition is grounded solely on the argument that TECA has ignored the *Beam* decision and

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[3] Pursuant to the signing of Senate Bill 1569, TECA is being phased out and its jurisdiction transferred to the Court of Appeals for the Federal Circuit. Henceforth, the Federal Circuit will be the sole appellate court speaking to these issues.

[4] In addition to the Northern District of California in *Van Vranken*, the courts for the Western District of Michigan, The Northern District of Illinois, and the Eastern and Western Districts of Wisconsin made similar rulings with regard to V factor reallocations. The district court opinions are cited in *Van Vranken, supra* at 423.

broken with other federal appellate courts to permit the enforcement of an invalid regulation against all except the party who originally challenged its promulgation. That is not accurate. As explained above, a simple reading of the TECA decision demonstrates that neither it or the DOE were applying an invalid regulation to ARCO. It is simply that the invalidation of the particular regulation at issue here does not compel a change in ARCO's cost allocations when viewed in the context of the other regulations and equitable considerations of the price control program. Since ARCO's central assertion does not accurately reflect TECA's ruling, and ARCO offers no other reason why this Court should grant its Petition, there are no grounds upon which the requested review can be granted.

I. THE DECISION OF THE TEMPORARY EMERGENCY COURT OF APPEALS DOES NOT TURN ON THE INAPPLICABILITY OF THE *BEAM* DECISION IN CASES INVOLVING FEDERAL AGENCY REGULATIONS

ARCO argues that certiorari is appropriate because TECA has misconstrued and evaded the *Beam* decision. This argument misstates the rationale for the TECA decision, which did not turn on either an interpretation or evasion of the principles set forth in *Beam*. Contrary to ARCO's assertion, TECA did not hold that *Beam* is inapplicable to "federal court decisions invalidating agency regulations." (Pet. at 7.) Therefore, the TECA decision does not present this Court with the opportunity to "resolve a conflict among the Courts of Appeals" as to that issue. (Pet. at 7.) In fact, without reversing an

independent rationale for the judgment below which is completely grounded in DOE regulatory law, no clarification of *Beam* will produce the result which ARCO seeks. For this reason, it would be equally inappropriate to accept ARCO's suggestion to defer action on this petition pending a resolution of the appeal in *Harper v. Virginia Dep't of Transportation*, 410 S.E.2d 629 (Va. 1991), *cert. granted*, 112 S. Ct. 1934 (1992). Since the *Beam* decision is not the grounds for the TECA judgment, this Petition should be denied.[5]

A reading of the TECA decision confirms that TECA did not ground its judgment on *Beam*. Rather, TECA merely observed in passing that "[w]hether *Beam* has any applicability to agency adjudications is questionable." (Pet. App. at 7a.) TECA then went on to affirm the DOE's actions on grounds which are totally independent of its comments regarding the possible inapplicability of *Beam* in a non-constitutional context. In fact, TECA's discussion of the reasons behind its holding begins by acknowledging that its decision would be the same regardless of whether *Beam* is applicable to regulatory cases. TECA states: "Moreover, even if *Beam* is applicable to this case, its application does not entitle ARCO to the desired remedy of reallocating its costs for the applicable period." (Pet. App. A at 8a.)

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[5] In addition, *Harper*, which was argued on December 2, 1992, involved the application of the *Beam* principle in a constitutional law context. Accordingly, it is unlikely that *Harper* would provide substantial guidance even if this case presented the question of whether *Beam* applies to a non-constitutional regulatory invalidation.

II. DENIAL OF ARCO'S REQUESTED REALLOCATION DOES NOT CONSTITUTE THE APPLICATION TO IT OF AN INVALID REGULATION

ARCO's argument in support of its Petition is based on two faulty premises: (1) that the relief afforded the Mobil Oil Corporation in its litigation with the DOE resulted solely from the invalidation of the April 1974 V factor amendment; and (2) that denying ARCO permission to reallocate its V factor costs constitutes the application to it of "the old rule" in contravention of the *Beam* decision. ARCO's discussion of the *Mobil* litigation completely ignores the fact that it resulted from an administrative procedure, known as a request for an "Exception," in which Mobil had asked the DOE to allow it to deviate from the operation of the V factor regulation.

Pursuant to the DOE regulations, exception relief is granted upon a showing of serious hardship or gross inequity.[6] *Mobil,* 610 F.2d at 800. As TECA noted, Mobil had demonstrated $75,000,000 in losses in 1974 and 1975 in support of its exception request. *Id.* Nonetheless, the DOE twice denied Mobil's petition. *Id.* Following the second denial, Mobil brought an action in district court seeking a declaration that the DOE had abused its discretion in denying the requested exception relief, and

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[6] The procedural requirements for obtaining exception relief from the DOE are contained in 10 C.F.R. § 205.50 et. seq. (Subpart D). This subsection provides for the waiver by the DOE of the requirements of a valid, operative regulation where there has been a showing that the regulation is causing serious hardship or gross inequity to the requesting party.

also that the 1974 V factor regulation was invalid. *Id.* On cross-motions for summary judgment, the district court ruled for Mobil as to both the invalidity of the 1974 amendment and the denial of the exception relief. *Id.* It therefore entered judgment granting Mobil the relief that it had requested from the DOE -- the right to allocate exempt product costs to covered product prices.

On appeal, TECA affirmed the findings of the district court as to the defects in the promulgation of the April 1974 V factor amendments and declined to review the district court's finding that the denial of exception relief was an abuse of discretion and without substantial basis in fact. *Id.* Although TECA observed in *dicta* that it "assume[d], *without deciding*, that Mobil [was] in no need of exception relief from the operation of the [1974] amendment," it is beyond dispute that the basis underlying the relief afforded Mobil by the district court was broader than the mere invalidation of the V factor amendment, and included the determination that Mobil was entitled to the reallocation on hardship grounds. *Mobil I, supra,* 610 F.2d at 804; emphasis added.

The issue that TECA declined to decide in *Mobil I* -- whether the defects in the 1974 amendment process, without more, would entitle a refiner to reallocate exempt product costs to covered products -- was resolved ten years later in *Van Vranken v. Atlantic Richfield Company*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989), *cert. denied*, 494 U.S. 1005 (1990). There, TECA held that if the cost allocations submitted by a refiner were also legal under the "new" rule applicable after the invalidation of the V factor regulation, then the invalidation itself creates "no *requirement* that the cost allocations be changed." (Pet. App. A at 9a.) Since there was no *requirement* of

reallocation, TECA held that the ability to reallocate turns on the application of the various DOE regulations and equitable considerations governing discretionary cost reallocations. *Van Vranken, supra,* 890 F.2d at 424. In both *Van Vranken* and the decision at issue here, TECA held that there were certain equities that militated against the grant of discretionary permission for ARCO's requested reallocation. In both opinions, TECA noted that ARCO was aware that it was required to obtain permission from the DOE for any cost reallocation, and that ARCO had failed to conscientiously pursue its administrative remedy. Petition, App. A at 10a, and *Van Vranken, supra,* 890 F.2d at 424-25

> At oral argument, ARCO suggested that once we declared the 1974 amendment invalid, refiners had an indefinite period in which to retroactively reallocate their costs. This argument is without merit. If ARCO believed the 1974 amendment was invalid, the company should have taken steps to protest the regulation rather than attempt to jump on Mobil's coattails five years after the amendment became effective. ARCO could have, like Mobil, challenged the regulation. The company could have also sought to intervene in Mobil's action, *or requested administrative relief as Getty did.*[7] Having failed to challenge the regulation in a timely manner, *ARCO is not entitled to relief at this late date.* (Emphasis added.)

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[7] This is a reference to the Getty Oil Company which sought an obtained Exception relief from the operation of the V factor amendment. See, *Mobil I,* 610 F. 2d at 800 and n. 5.

In the TECA opinion from which this Petition has been taken, the Court also noted a general policy against permitting retroactive cost reallocations for the sole purpose of eliminating overcharges resulting from unrelated violations of the price control regulations. It held that the DOE's denial of ARCO's reallocation request was "consistent with other cases involving private actions under the price regulations which 'uniformly hold that where the original cost allocation was permissible but not required, retroactive recalculation should not be allowed to offset overcharges which had arisen as a result of unrelated regulatory violations.' *Chevron U.S.A., Inc. v. Dep't of Energy,* 944 F.2d 914, 917 (Temp. Emer. Ct. App. 1991) (citations omitted)." (Pet. App. A at 9a.)

Accordingly, TECA's affirmance of the DOE's denial of permission for ARCO to reallocate exempt product costs to covered product prices for the sole purpose of asserting the affirmative defense of offset in the *Van Vranken* action turned on multiple considerations peculiar to the DOE price control program, and not on the refusal of the appellate court to heed the ruling in *Beam*. Even assuming that clarification of the *Beam* decision as it applies to non-constitutional or regulatory cases is desirable, this case is not the appropriate vehicle for review of that issue.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 6, 1993

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DON VAN VRANKEN, on behalf of himself
and others similarly situated and
LEW & TED'S SERVICE, INC.,
Plaintiffs

v.

ATLANTIC RICHFIELD COMPANY,
Defendant

SINCLAIR OIL COMPANY,
Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant.

Order Setting Trial Schedule; Denying Plaintiffs' Motion To File Third Amended Complaint; Granting Defendant's Motion To Exclude Six Distributors On The Grounds Of Res Judicata; Denying Defendant's Motion For Reconsideration Of The August 8, 1990 Order; Denying Defendant's Motion For Interlocutory Appeal; Granting In Part Summary Judgment To

Defendants On Issue Of Cost Banks; Vacating Order Of June 7, 1989; Vacating Order Of February 12, 1990; Vacating Order Of September 1, 1989; Reversing Order Of July 6, 1989; Modifying Order Of August 8, 1990 Re ¶52(2); Modifying Order Of January 9, 1991; Granting Leave To File Briefs Of 50 Pages For Reconsideration Of This Order

(District Court No. C-79-0627-SW, C-89-20760-SW)

[Filed: February 12, 1991]

[EXCERPT]

IV. Solution and Final Analysis

After a careful review of the cases and the orders in this action, this court concludes that maintaining the previous inconsistent approaches is impossible and that ARCO's interpretation and method of trying the case is correct, with some modifications.

For the reasons explained below, the motion for leave to file the Third Amended Complaint is DENIED, and ARCO's motion for summary judgment on the issue of cost banks is GRANTED IN PART. Plaintiffs will be allowed to attack the size of the cost banks based on ¶52(2) of the Second Amended Complaint. The Order of June 7, 1989, the Order of Feb. 12, 1990, and the Order of August 8, 1990 concerning ¶52(2) are VACATED. Magistrate Judge Trumbull's Order of July 6, 1989 is

REVERSED, and the Order of September 1, 1989 is VACATED. The Order of August 8, 1990 concerning ¶52(2) is MODIFIED, and the Order of January 9, 1991 is MODIFIED.

A. One Cause of Action

The decision to change one pricing mechanism is one cause of action, even if that pricing mechanism affects only a subcomponent of a factor. Therefore, the change from the tax reference price to the internal transfer price is one cause of action.

TECA seems to have indicated quite clearly that a plaintiff must plead and prove a separate cause of action in a complaint and that each subcomponent of a factor constitutes one cause of action. Rookwood held that plaintiffs cannot challenge a method of calculation which is time-barred. Rookwood also held that a plaintiff cannot plead a time-barred claim by attaching it to a timely claim. This holding indicates that the miscalculation of each subcomponent of a factor must be alleged as a separate cause of action and treated as such for purposes of applying the statute of limitations.

The challenge to the calculation of the cost banks based on ¶52(1) and the challenge to the calculation of the cost banks based on ¶52(3) of the Second Amended Complaint are two separate causes of action. These two components of calculating cost banks were instituted prior to 1976, with the first resulting overcharge shortly thereafter. Therefore, they are barred by the three-year statute of limitations.

B. One Transaction or Occurrence

In addition, the decision to change from the external transfer price to the internal reference price is one transaction for purposes of Rule 15(c) because the set of facts creating that cause of action was the decision by ARCO to change the pricing of interaffiliate crude oil. Even if the pricing decision ultimately affected the computation of the A Factor and the total price, the set of facts surrounding that decision is separate from the set of facts surrounding the decision to change the method of valuing the cost of transportation of crude oil. The earlier analysis that all claims relating to the A Factor arose out of the same transaction and occurrence is incorrect.

This case is not like Sessions, a Title VII case, in which the act of discrimination supported several difference causes of action, or Siegel, in which the single transaction was the decision to violate the tariff law. The case at bar is more similar to the cases finding that there were separate transactions and occurrences. Like Percy and Holmes, the proposed Third Amended Complaints in this case address a set of facts and a pricing decision that differ in type and time from the ones alleged in the 1979 complaint.

Therefore, the claims in the Third Amended Complaint do not arise out of the same transaction and occurrence as the claims in the 1979 complaint. For example, the decision to change the method of calculating the marine transportation costs of crude oil is a transaction or occurrence separate from the decision to change from an external transfer price to an internal reference price. All the claims in the Third Amended Complaint can be analyzed similarly.

C. Cost Banks and ¶52 of the Second Amended Complaint

Paragraph 52(2) of the Second Amended Complaint is not time-barred because the statute of limitations for the Second Amended Complaint is tolled by the period of the stay sought and obtained by ARCO from 1979 to 1985. ARCO appeared to concede that the statute of limitations would not bar ¶52(2), had ¶52(2) been filed in 1979. This action was stayed from 1979 until 1985, over plaintiffs' objection, and the Second Amended Complaint was filed in 1985. Although approximately one month elapsed between the partial lift of the stay to allow the filing of motions and plaintiffs' motion to file the Second Amended Complaint, the Second Amended Complaint will be treated as if it had been filed on the same day the First Amended Complaint was filed: April 18 1979. ARCO should not benefit from the fact that a stay was instituted in this case by asserting a defense of statute of limitations against plaintiffs. Plaintiffs should not be penalized for failing to file the Second Amended complaint in 1979 because the stay prevented them from taking any action in this case. Plaintiffs made this tolling argument in "Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss the Second Amended Complaint." See Docket No. 61 at 22-23.

The other allegations in 52 of the Second Amended Complaint are not timely filed, even if this court treats the Second Amended Complaint as if it were filed in 1979. The attack on cost banks in ¶52(1) and ¶52(3) are barred by the statute of limitations because those methods of calculation were instituted prior to 1976. Thus, the attack on cost banks in ¶52(1) and ¶52(3) would have been

barred by the statute of limitations, even if the Second Amended Complaint had been filed in 1979.

D. Proof at Trial and Discovery

At this point, it is necessary to discuss the proof that plaintiffs can present at trial and the discovery that plaintiffs can seek.

The earlier belief that plaintiffs were allowed to challenge every component of the maximum allowable price is incorrect. Therefore, plaintiffs are bound by the calculations of the cost of other components that ARCO provided to the DOE in the RMCAR's. All parties must accept the accuracy of the numbers provided in the RMCAR's. Neither side will be allowed to challenge the computation of the figures or the method of calculation in the RMCAR's filed for components not addressing the cost of interaffiliate crude oil and ¶52(2).

Plaintiffs point out that there might be several RMCAR's for any given month. However, both sides will be bound to the latest RMCAR filing for each month. For example, if ARCO filed one RMCAR on January 15, 1977 for the price of the B Factor for January 1977 and a final RMCAR on January 31, 1977, both sides would be bound by the January 31, 1977 filing. ARCO cannot attack its own calculations; ARCO cannot now claim that the calculation of the B Factor in January 1977 was mistakenly made in plaintiffs' favor such that it offset any overcharge for the cost of crude oil.

In attacking the calculation of the cost banks, plaintiffs can attack only the method of computation referred to in ¶52(2), and all parties will be bound to the

calculations of other subcomponents of the cost banks as filed in the RMCAR with the DOE.

For discovery purposes, plaintiffs are limited to discovery relating to the calculation of the interaffiliate crude oil cost and the miscalculation of the cost banks as alleged in ¶52(2), the $56.7 million in import fees and duties. However, to the extent that plaintiffs do not have the RMCAR's that ARCO submitted to the DOE, plaintiffs may discover them from ARCO.

At trial, plaintiffs will be required to prove the final overcharge by plugging in the RMCAR numbers into the regulatory formulas. If ARCO wishes to rebut plaintiffs' calculations, ARCO must also plug in these same numbers. This court will assume that any overcharge in the cost of calculating the interaffiliate crude oil or cost banks based on ¶52(2) was reflected in a final overcharge.

ARCO has hinted in previous hearings that ARCO plans to assert an affirmative defense that, even if ARCO's decision to use the internal transfer price violated the Act, there was no final overcharge because the cost banks contained sufficient reserves to justify the increased price. This argument is similar to the second affirmative defense raised by defendant in Trans Tech. 755 F.2d at 1577. However, ARCO cannot claim this as an affirmative defense because ARCO did not assert this defense in the Answer to the Second Amended Complaint. ARCO can defend against plaintiffs' attack on the miscalculation of the cost banks as alleged in ¶52(2) of the Second Amended Complaint. ARCO simply cannot use this cost

banks defense against the interaffiliate crude oil cost claim.

/s/ Spencer Williams
United States District Court

APPENDIX B

IN THE TEMPORARY EMERGENCY COURT OF APPEALS
OF
THE UNITED STATES

Case No. 9-110

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellant,

v.

DON VAN VRANKEN on behalf of himself and all others similarly situated, and LEW & TED'S SERVICE, Inc.
Plaintiff-Appellees.

[Filed November 23, 1992]

NOTICE OF APPEAL

Atlantic Richfield Company ("ARCO") hereby appeals to the Temporary Emergency Court of Appeals of the United States ("TECA") from the final judgment entered November 20, 1992, by the Honorable Spencer Williams in the United States District Court of California.[8]

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[8] ARCO had previously filed a protective notice of appeal on October 16, 1992 (TECA No. 9-109). By order dated October 29, 1992, the Chief Judge dismissed that notice of appeal without prejudice.

ARCO also appeals the district court's legal ruling relating to that final judgment, as summarized below.

Pursuant to TECA Rule 15, appellant ARCO submits the following information:

1. List of other counsel: Attached hereto as Exhibit A is a list of the names, addresses and telephone numbers of all other counsel to the proceeding.

2. (a) Brief description of the subject matter and issues of the case: This is a private overcharge case brought by a plaintiff class of wholesale purchaser/resellers pursuant to § 210(b) of the Economic Stabilization Act in which plaintiffs allege four violations of price control regulations governing imported crude oil. The jury returned a special verdict on July 23, 1992 finding that ARCO willfully overstated its costs with respect to three of the four issues and awarded the plaintiff class a total of $ 22.8 million. The jury found in ARCO's favor on the fourth claim.

On appeal, the issues are whether:

(1) the district court erred in instructing the jury that a willful overstatement of recoverable costs was the equivalent of a willful sale in excess of the maximum lawful sales price;

(2) the district court erred in ruling that ARCO could not present evidence of its available unrecovered costs to defend against plaintiffs' claims;

(3) the district court erred in refusing to permit ARCO to amend its answer;

(4) the district court erred in awarding prejudgment interest;

(5) the district court erred in ruling that plaintiffs' claims were not barred by the statute of limitations;

(6) the district court erred by holding that plaintiffs stated viable fees and duties claims despite their failure to plead
willfulness;

(7) the district court erred in failing to instruct the jury as to the proper standard of willfulness under § 210;

(8) the district court erred in ruling that there was sufficient evidence that ARCO intentionally violated a know legal duty;

(9) the district court erred in instructing the jury that ARCO violated the regulations;

(10) the district court erred by preventing ARCO from rebutting plaintiffs' damage contentions;

(11) the district court erred by refusing to apply the entire amount received by class members from the consent order fund to offset the damages award and by basing the proportional offset on the amount of the fees and duties overstatements;

(12) the district court erred in failing to require plaintiffs to mitigate their damages;

(13) the district court erred in certifying this proceeding as a class action;

(14) the district court erred by refusing to declare a mistrial following the misconduct of plaintiffs' counsel;

(15) the district court erred in precluding ARCO from introducing evidence as to the views of present and former government officials regarding the meaning and clarity of the price regulations;

(16) the district court erred in refusing to order a new trial on damages because the jury award was excessive; and

(17) the district court erred in its rulings on numerous evidentiary issues.

(b) The statute under which the appeal is taken: This appeal is taken pursuant to § 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note.

3. Forma Pauperis/Pro Se information: No party to this proceeding is in Forma Pauperis and /or Pro Se.

4. Appeals to other courts of appeal: ARCO has filed a protective notice of appeal to the United States Court of Appeals for the Ninth Circuit by filing a Notice of Appeal with the district court pursuant to Federal Rule of Appellate Procedure 4. ARCO moved for a stay of

proceedings in the Ninth Circuit pending a determination by this Court of the extent of its jurisdiction. However, the Ninth Circuit has not yet ruled on the motion for stay.

5. Transcript information: A 2928 page transcript of the trial proceedings was prepared by Palmer Computer Services, Electronic Recording Transcriber, from electronic sound recordings provided by the United States District Court for the Northern District of California, Jeanne Le Roy, audio operator. Under TECA Rule 18(a), in conjunction with Rule 10(a) of the Federal Rules of Appellate Procedure, the transcript is a component of the record on appeal, and will be provided by ARCO in fulfillment of the transmission of record duty imposed on appellant by TECA Rule 19. In addition, transcripts or oral argument on various motions, such as summary judgment and pre-trial motions, as well as post-trial proceedings will be transmitted to the extent these transcripts are referenced in the briefs.

Dated: November 23, 1992

Respectfully submitted,

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